THE WRITTEN AND SPOKEN WORD

(How To Write And Talk Gooder.)

THE THREE C’s

- Clear
- Concise
- Concrete

David Thayne Jones
Acting in my own interest
Utah State Prison
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

David Thayne Jones, wanting to go home vs. Hank Galetka, Warden, U.S.P. wont let me go home	MOTION TO GO HOME CASE NO: _____ JUDGE: _____

Let me go home now, cause I don't know Hank Galetka, and I don't know if I like him, and I'm not having fun here, and I miss my dog, and I miss my Mom.

Also I don't like the food here, and the guards are mean, and I don't like being locked-up, and I don't like steel and concrete, and I am here also under an ILLEGAL SENTENCE.

So let me go home and I promise to be good.

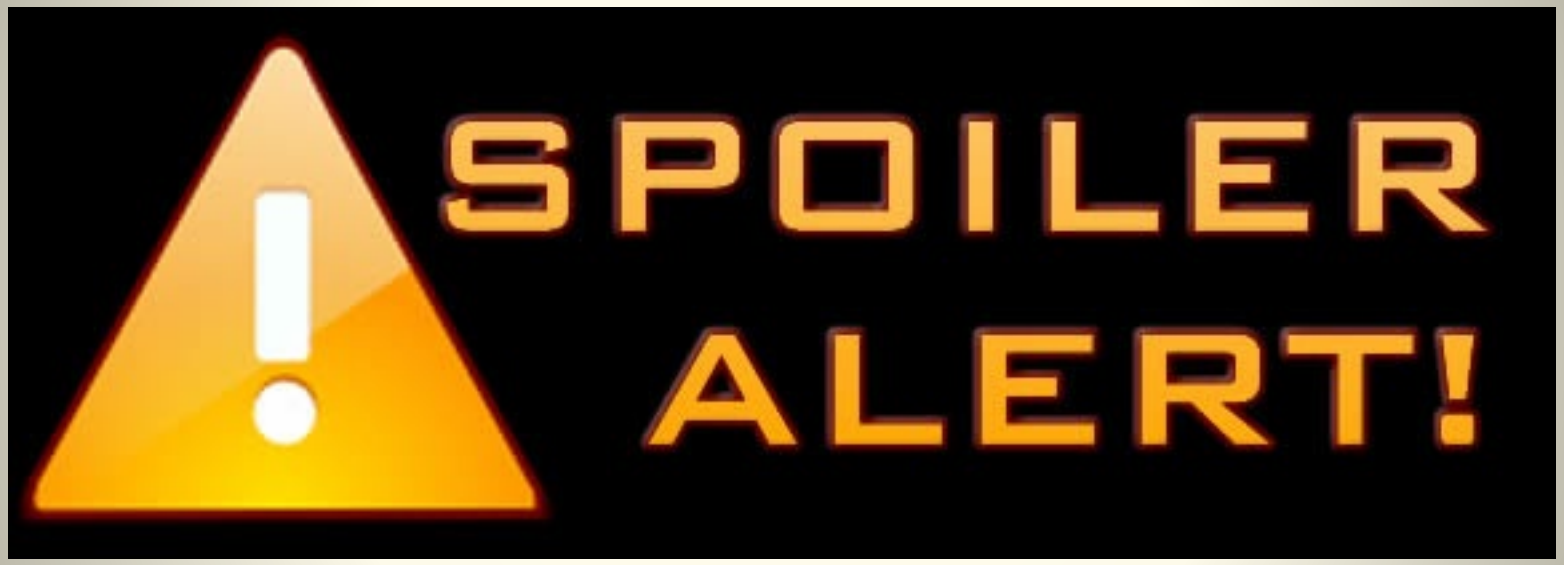
Dated this 22nd day of October 1998

David Thayne Jones, wanting to go home

CLEAR

The main tool for clarity:

ORGANIZATION


SPOILER
ALERT!

ORGANIZATION

- Use spoilers.
- At the earliest possible point, tell the court what your case is about.
- Plot twists enrich fiction;

  they eviscerate expository writing.

ORGANIZATION

- Remember to read the rule & follow what the rule says.

  Unless you can get away with not following it.
- There are times when strict adherence to the rules will not facilitate clarity.
- Look for ways to use organization that both substantially complies with the rule and promotes clarity.
- Know when you can “bend” the rules and when you can’t.

TELLING THE COURT WHAT THE CASE IS ABOUT

- Appellate briefs:

➢Introductory statement before anything else.

➢First thing in the issue statement before you even start talking about the issues.

TELLING THE COURT WHAT THE CASE IS ABOUT

- Introductory statement in a single issue brief:

➢Weave the facts and law together to show why you win.

- Introductory statement in a multi-issue brief:

➢Tell the court about the facts in a way that shows why you should win.

➢Then provide more of the law, facts, and procedure in each issue statement to provide relevant context for the issue.

INTRODUCTORY STATEMENT

Defendant confessed to murder during a mid-day, post-*Miranda* interview that lasted less than an hour. He was not handcuffed, suffers from no mental defect, and was allowed to speak with his wife before the interview. When he confessed, Defendant did not parrot a story that had been given him by the detectives, but instead provided an account of the murder that contradicted what the detectives had earlier suggested may have happened.

Despite all this, the trial court suppressed Defendant's confession solely because detectives had appealed to Defendant's love for his daughters during the interview. The court's categorical approach runs contrary to settled authority and sound public policy, and it should accordingly be reversed.

ISSUES

Maurine Hunsaker disappeared from the Gas-A-Mat station where she worked. Two days later, a hiker discovered her body at Storm Mountain. *State v. Menzies*, 889 P.2d 393, 396 (Utah 1994), *cert. denied*, 513 U.S. 1115 (1995).

Maurine's thumb print was in the car Menzies was driving the night Maurine disappeared. Her identification was found in a jail room Menzies ran to while being booked on an unrelated arrest. More of Maurine's identification was found in Menzies' girlfriend's belongings. Maurine's purse was at Menzies' apartment. Green shag carpet fibers found on Maurine's clothing were similar to fibers from the carpet in Menzies' apartment. The day after Maurine disappeared, two eyewitnesses saw a man and woman walking together at Storm Mountain. The woman wore clothing similar to the clothing on Maurine's body. The man wore a parka similar to a parka Menzies owned. One eyewitness selected Menzies' photograph from an array as looking the most like the man he had seen. After his arrest, Menzies phoned his friend and directed him to $115 Menzies had hidden in his apartment. $116 was missing from the Gas-A-Mat.

ISSUE STATEMENT

Honie broke into Claudia Benn's home. He slashed her throat four times, stabbed her in the vagina three times, and stabbed her in and around her anus. After police surrounded the home and Honie exited, he said, "I stabbed her. I killed her with a knife." These facts are not disputed.

ISSUES AND STANDARDS OF REVIEW

1. The jury saw a videotape of Kell stabbing Lonnie Blackmon sixty-seven times, including in the eyes. It heard about Kell's extensive history of violence and threats of violence while incarcerated. It knew that Kell murdered Blackmon while serving a life-without-parole sentence. Was there any reasonable likelihood that anything counsel could have done for Kell may have resulted in a conviction of something less than capital murder or sentence less than death?

ISSUE STATEMENT

- Organize/re-organize for clarity:

➢When representing the movant or appellant, organize your issues to

1. Avoid repetition;
2. Put your strongest argument first;
3. Provide a clear path for the court to rule for you.

➢When representing the respondent or appellee, don’t slavishly follow you opponent’s organization. Re-organize under principles 1-3.

RE-ORGANIZED ISSUE STATEMENTS

- *State v. Clark*. Murder over drug deal gone bad. A week later, Defendant was arrested with the murder weapon (.40 caliber Beretta), but claimed that he wasn't at the murder scene, that the gun belonged to co-defendant who admitted to being at the murder scene, and that he obtained the gun only after the murder.

- Three eyewitnesses testified that Defendant was at the murder scene and two saw him fire the fatal shots. The prosecution also had evidence that Defendant used the murder weapon in a shooting a month and a half earlier.

- The trial court allowed the State's ballistics expert to testify but excluded the Defendant's expert. The court admitted evidence of the prior shooting under rule 404(b), Utah Rules of Evidence.

RE-ORGANIZED ISSUE STATEMENTS

- Defendant's issue organization:

➢ 1. "Whether the court erred by admitting and/or not limiting the State's firearm toolmark expert testimony. Alternatively, whether the court erred by excluding the firearm toolmark expert testimony offered by the defense."

➢ 2. "Whether the State engaged in prosecutorial misconduct during rebuttal."

➢ 3. "Whether the court erred by denying the motion to suppress Audra S.'s and Debbie L.'s eyewitness identifications."

➢ 4. "Whether the court erred by giving an accomplice liability instruction that did not inform the jury that a person is only guilty as an accomplice if he acted with the mens rea to commit the principal offense."

RE-ORGANIZED ISSUE STATEMENTS

- State's re-organized issues:

➢ 1. Did the trial court properly admit eyewitness identification testimony from the victims, one of who knew Defendant?

➢ 2. Did the trial court abuse its discretion in ruling that:

➢ (a) testimony from the prosecution's firearms identification was admissible;
➢ (b) Defendant's proffered firearms identification expert was not a qualified expert; and
➢ (c) evidence that Defendant had used the murder weapon in a prior shooting was admissible under rule 404(b), Utah Rules of Evidence, to prove Defendant's identity?

➢ 3. Did the trial court plainly err in not sua sponte striking, or was trial counsel ineffective for not objecting to, portions of the prosecutor's closing argument?

➢ 4. Did the trial court erroneously instruct the jury on accomplice liability by quoting the accomplice liability statute essentially verbatim?

ISSUE STATEMENT

- The purpose is to correctly identify the issue.
- Loaded issue statements don’t help.
- BUT whenever possible, draft the issue statement in a way that the answer is in your favor.

ISSUE STATEMENT

- Did the trial court erroneously rely on inadmissible evidence?

➢Obviously, a trial court errs when it relies on inadmissible evidence.

➢Most likely, the issue is whether the evidence was admissible.

ISSUE STATEMENT

- Did the trial court erroneously admit hearsay testimony?

➢This one doesn't give enough information to let the court know what the issue is:

1. Is it whether the testimony was hearsay?
2. Is it whether the testimony was hearsay, but admissible under an exception?

ISSUE STATEMENT

- Try this: Did the trial court properly overrule a hearsay objection to admitting the defendant's out-of-court statement against him?

➢This tells the appellate court what the lower court ruled;

➢It gives the basis for the ruling; and

➢It tells the appellate court that the trial court ruled correctly.

ISSUE STATEMENT

- NO: Did the trial court properly deny the Defendant's motion for a new trial where Defendant's newly discovered evidence was discoverable before trial by reasonably diligent investigation?

ISSUE STATEMENT

- YES: Does evidence that defendant spoke with the victim's mother before the murder qualify as "newly discovered evidence" for purposes of a new trial motion?

➢It does not assume the legal conclusion in the State's favor.

➢Instead, it articulates, based on what is undisputed, why it should be resolved in the State's favor.

ISSUE STATEMENT

- Does imposing the statutory prison term shock the moral sense of all reasonable persons where the seventeen-year-old defendant forced an eight-year-old girl to perform fellatio on him?

➢This statement incorporates the legal standard.

➢It suggests the answer in the State's favor; specifically, "no."

ISSUE STATEMENT

- Don’t try to incorporate too much into a single-sentence issue statement:

➢NO: Did the district court properly grant summary judgment on Honie’s challenge to trial counsel’s investigation into a voluntary intoxication defense, which would have required finding that Honie did not know he was killing a person, where Honie’s statements and actions showed there was no factual issue about whether Honie know he was killing a person?

ISSUE STATEMENT

- YES: Honie claimed that trial counsel did not adequately investigate a voluntary intoxication defense. That defense would have succeeded only if Honie was so intoxicated that he did not know he was killing a person. The district court granted summary judgment because Honie's statements and actions showed there was no factual issue about whether he knew he was killing a person. Was that ruling correct?

1. Menzies raised numerous challenges to trial counsel's guilt phase representation. He appeals the denial of three claims as follows:

Acceptable defense theory.

Menzies insisted he had nothing to do with the murder. Trial counsel therefore argued the State had not proven (1) that Menzies killed Maurine, or (2) an aggravator that would support a capital murder conviction. Counsel did not rely on a mental illness defense. Menzies proffered no substantial evidence that a mental illness prevented him from understanding he was killing a person.

Did the district court correctly conclude that Menzies could not prove ineffective assistance because counsel chose to rely on a failure-of-proof defense rather than a mental illness defense?

Storm Mountain witnesses.

Trial counsel elicited evidence that the Storm Mountain witnesses (1) were distracted, (2) could not positively identify Menzies, (3) could not positively identify the car Menzies was driving as the one they saw at Storm Mountain, and (4) saw nothing unusual about the couple they saw. Trial counsel relied on the testimony to argue that the State failed to prove Maurine was held against her will or that Menzies was with Maurine. Menzies claimed counsel were ineffective because they did not learn exactly what was distracting the witnesses. Menzies argued that trial counsel should have moved to suppress the witnesses' testimony because their activities at Storm Mountain made their testimony unreliable. For the first time on appeal, Menzies argues the photo array was unduly suggestive.

Did the district court correctly deny Menzies' ineffective assistance claim where trial counsel established the material point – the witnesses were distracted – and the reason for the distraction was immaterial? Should this Court deny relief on the photo array where Menzies never claimed it was unduly suggestive and has not shown that the other photographs were "grossly dissimilar" to Menzies'?

Jail informant.

Jail inmate Walter Britton testified Menzies confessed he killed Maurine. Menzies claimed trial counsel should have impeached Britton based on alleged mental illnesses. The district court granted summary judgment because, among other things, Menzies proffered no evidence available to trial counsel of a mental illness that could have been used to impeach Britton.

Was that ruling correct?

ARGUMENT SUMMARY

- Don’t just repeat your point headings:

1. It isn’t helpful; and
2. The rules prohibit it anyway. Utah R. App. P. 24(a)(8); Fed. R. App. P. 28(a)(8).

- Spend some quality time with this:

➢ It’s your first opportunity to tell the court why you win.

➢ It may be the only thing some judges will have time to read before oral argument.

Voluntary intoxication defense (point I, Honie's point I.A). Honie claimed that trial counsel was ineffective in their investigation of a possible voluntary intoxication defense. That defense applies only when intoxication negates the requisite mental state. Therefore, the defense would have succeeded only if, by virtue of his intoxication, Honie did not know he was using lethal force against a person when he slashed Claudia's throat four times, stabbed her in the vagina three times, and stabbed her in and around her anus.

The district court correctly granted summary judgment on this claim. Honie's statements – including his statement "I stabbed her. I killed her with a knife" – showed that he knew he was using lethal force against a person. And the specifics of the attack showed a mental state greater than mere recklessness.

Honie has not shown error. He argues only that trial counsel should have commissioned an expert to estimate his actual blood alcohol level and to testify that alcohol and drugs combined cause greater impairment than either does on its own. But that would not have shown that Honie did not know that he was killing a person. And Honie has never proffered any evidence that he in fact did not know he was killing a person or that he told his counsel he did not know he was killing a person.

TELLING THE COURT WHAT THE CASE IS ABOUT (trial court)

- The same basic rule applies: tell the district court at the earliest possible moment what it has in front of it.
- This will incorporate the equivalent of the appellate introductory statement, issue statement, and argument summary.
- State court: do this in both the motion and at the beginning of the memorandum.
- Federal court: do this at the beginning of the motion/memorandum.

TELLING THE COURT WHAT THE CASE IS ABOUT (trial court)

- Brief summary of what is at issue and the relief you want or oppose.
- Then a brief summary of the facts and your argument why you win.

➢In state court, do a more detailed version of this in the motion, and a shortened version at the beginning of the memorandum.

- Replies should stand on their own.

On September 30, 2013, Lafferty filed what he benignly calls a Notice of Supplemental Information provided to Michael First, M.D., one of his competency experts. With it, he attached a report from an expert contradicting conclusions relied on by respondent's expert, Noel Gardner, M.D. And he represents that Dr. First may testify at the hearing about the new material, although he includes no supplemental report from Dr. First.

Pursuant to Fed. R. Civ. P. 26(a)(2) and 37(c), respondent, through counsel, moves to strike the report filed with the notice and to preclude any testimony based on it. The report purports to rebut and contradict parts of Dr. Gardner's report and supporting materials, all of which respondent provided to Lafferty on November 21, 2012. Doc. no. 238. By rule, then, Lafferty should have submitted a supplemental report from his experts no later than December 20, 2012. Federal R. Civ. P. 26(a)(2)(D)(ii). And even if the Court's May 2013, order allowing supplementation meant to include the rebuttal suggested in the September 30th material, Lafferty should have filed a supplemental report from his experts no later than July 26, 2013. Doc. no. 260 at 1.

Lafferty has done neither. Instead, he merely filed a report from a non-testifying expert that he says he has given to Dr. First. And he says Dr. First may present undisclosed testimony based on it. The supplemental material is untimely and should be stricken. And Lafferty's experts should be prohibited from presenting testimony on it because Lafferty has included no timely report disclosing any opinions and conclusions, or bases for either suggested in the supplemental material.

Respondent details the basis for the motion below.

Respondent, through counsel, submits the following reply in support of his motion to strike Dr. Meyer's report and exclude any testimony based on it.

The Meyer report contradicts conclusions reached by Dr. Ranks, a psychologist respondent's testifying witness, Noel Gardner, M.D., relied on to confirm his conclusions. Respondent sent Dr. Gardner's report – which appended Dr. Ranks' report – to Lafferty's counsel eleven months ago. Lafferty's counsel proffered no rebuttal then. And when the Court set the July 26, 2013, deadline for supplemental reports that included "any responsive argument," the only supplemental report Lafferty submitted included no response to Dr. Ranks' materials.

Instead, Lafferty withheld that response for more than two months and less than one month before the competency hearing is scheduled to begin. Respondent promptly moved to strike it and exclude all testimony because (1) the late disclosure violated the Court's July 26th deadline, (2) the late disclosure violated the controlling rules, and (3) the late disclosure prejudiced respondent because he would not have adequate time to respond to the Meyer material.

Lafferty responds that the rules respondent cites do not control because his testifying expert, Dr. First, based no conclusions on the Meyer materials. Instead, Lafferty proposes to use Dr. First as the conduit to admit the Meyer evidence. And he argues that respondent is not prejudiced because he has concluded that his late disclosure still gives respondent adequate time to respond.

Lafferty states no basis to deny respondent's motion. First, Lafferty has not addressed respondent's argument that the late disclosure violated the Court's order. The Court should grant respondent's argument on that independent and unrebutted basis alone.

Second, Lafferty continues to rely on rules that do not apply to expert disclosures or to habeas actions. The controlling rules required him to disclose the Meyer materials long ago. He did not, and the Court should grant the motion on that basis alone.

Third, Lafferty's assessment that respondent will have ample time to develop a response to the Meyer's material relies on a misleadingly incomplete statement of the situation Lafferty has put respondent in: Lafferty disclosed the material at a time Dr. Ranks is unavailable to assess or address it.

Finally, Lafferty's clarification – that Dr. First will only be a conduit for the Meyer material – raises another reason to strike it. Because Dr. First did not rely on the Meyer material for any conclusion he made, it is not admissible under Fed. R. Evid. 703. And Lafferty cites nothing for the proposition that Dr. First may merely recite the conclusions of a non-testifying expert.

The State, through counsel, submits the following memorandum opposing Carter's motion for a nunc pro tunc order.

Carter filed his Fourth Petition for Post-Conviction Relief on January 23, 2013. He asks the Court to order that the filing be "effective as of March 27, 2012" – the date on which he filed his Third Petition for Post-Conviction Relief in the closed second petition case (case no. 060400204). He argues that justice requires this relief because, without it, his claims may not be heard on the merits.

The State opposes the motion. Nunc pro tunc orders may be used to correct the Court's clerical errors so that the record reflects what actually happened. But they may not be used to correct legal error; in other words, to show what the Court might or should have decided. And they may not be used to avoid time limits set by statute or rule.

Here, the record already reflects what actually happened: the Third Petition was intentionally filed in the closed second petition case. There is no clerical error in the record to correct.

Carter actually asks the Court to enter the order (1) to correct a filing error, or (2) to protect him from a potential time-bar problem. Nunc pro tunc orders may not be used for either purpose.

Finally, Carter argues that he could have "easily corrected" the erroneous filing but for the State's "machinations." Nunc Pro Tunc Memorandum at 5. Carter cites nothing to establish that an opposing party's "machinations" may justify nunc pro tunc relief.

And the accusation is false. The State promptly alerted Carter to the jurisdictional problem. After that, the State did nothing to prevent Carter from immediately correcting the error and refiling the Third Petition as a new action. Carter chose instead not to correct the problem until the Court ruled that it lacked jurisdiction to address the Third Petition in the closed second petition case.

FACT AND CASE STATEMENTS

- CAST STATEMENT=PROCEDURAL HISTORY
- FACT STATEMENT=HISTORICAL FACTS
- The rules, federal & state, require separate statements, BUT
- Separating them sometimes undercuts clarity.

The State charged defendant with one count of rape of a child (R. 368). A jury convicted defendant as charged (R. 482). The trial court sentenced defendant to the statutory six-year-to-life prison term (R. 541). Defendant timely filed his notice of appeal (R. 527).

Over twenty-four years ago, Gardner shot Michael Burdell in the face. Burdell died.

A Utah jury convicted Gardner of first degree murder and sentenced him to death. The Utah Supreme Court affirmed. The United States Supreme Court denied review. *State v. Gardner*, 789 P.2d 273, 276 (Utah 1989), *cert. denied*, 494 U.S. 1090 (1990).

In the first state post-conviction proceeding, the state district court partially denied and partially granted relief. Both parties appealed. The Utah Supreme Court reversed the portion of the order granting relief and again affirmed Gardner's capital murder conviction and death sentence. The United States Supreme Court again denied review. *Gardner v. Holden*, 888 P.2d 608 (Utah 1994), *cert. denied*, 516 U.S. 828 (1995).

On January 17, 1997, Gardner filed a petition for writ of habeas corpus in the United States District Court for the District of Utah. (Doc.No.107).

While the federal habeas action was pending, Gardner exhausted a claim in the state courts. The state district court denied relief. The Utah Supreme Court affirmed. *Gardner v. Galetka*, 94 P.3d 263 (Utah 2004).

The federal district court then certified a state-law question to the Utah Supreme Court. Gardner v. Galetka, 151 P.3d 968 (Utah 2007).

On August 13, 2003, the magistrate judge issued his report and recommendation on all, but the unexhausted claim. The magistrate judge recommended denying habeas relief. (Doc.No. 590, addendum E.)

The district judge adopted the magistrate judge's recommendation with some modifications. (Doc.No. 693, addendum F.) After the exhaustion and certification process concluded, the district judge denied relief on the outstanding claim. (Doc.No. 694-2, addendum G.)

FACT AND CASE STATEMENTS

- Combining the two for clarity.
- A chronological recitation can give better context for a complex procedural history:

➢Start with what happened, then

➢Charges/complaint filed based on what happened, then

➢Trial court outcome, then

➢All the procedure that follows with additional relevant facts in chronological order.

FACT STATEMENT

- Before actually starting in on the facts, do a brief overview:

Claudia Benn put herself through school then returned to her tribe to assist with substance abuse counseling. She passed up more lucrative offers to do so. Fourteen years ago, Honie broke into Claudia's home. He beat her, bit her, slashed her throat four times, vaginally raped her with a butcher knife, and stabbed her in and around her anus. He prepared to rape her anally, but decided against it when he realized that she had died. At least one of Claudia's young granddaughters observed the attack. Later, while hiding from police, Honie digitally penetrated Claudia's granddaughter.

Defendant, who admitted he always carried a weapon and a restraint in case he encountered a victim, kidnapped and murdered forty-two-year-old Margo Bond, thirteen-year-old Stephanie Blundell, fourteen-year-old Tuesday Roberts, and sixteen-year-old Lisa Martinez. Margo, Stephanie, and Tuesday submitted to his pre-murder sexual assaults; he strangled them. Lisa fought back; he stabbed her at least 43 times with a quarter inch thick wood chisel, later explaining that he tended to attack “things that are aggressive.”

On November 23, 1988, Lance Wood took police to Dog Valley where he and Archuleta had murdered Gordon Church and left Gordon's body. There, Wood showed police a blood patch that covered the dirt road. It was approximately eight feet wide and thirteen feet long. Blood splattering radiated from the patch as far as eleven feet away. The blood had soaked four and one-half inches into the dry, frozen ground. Police later recovered bone, tissue, hair, a "mucous-type substance," and bits of plastic from an area that radiated eleven-feet from the patch. They also recovered from the murder scene battery cables, wire cutters, a tire jack bent to the point that it would not work, and a tire iron with blood on it from the tip to the crook. (TR2096, 2107-14, 2117-18, 2169-2200, 2215, 2220-29, 2240-42, 2251, 2261-62, 2513-31, 2535-36, 2600-2609.)

Wood also pointed out the place under two cedar trees away from the road where he and Archuleta had left Gordon's body. Gordon was naked from the waist down. He had a blood-soaked gag in his mouth and tire chains wrapped around his neck. (TR2118-20, 2123.)

The medical examiner later catalogued Gordon's injuries for the jury. Gordon's "entire left head . . . was depressed due to multiple fractures . . . . It was concave or pushed inward." Gordon suffered a blow to the head that resembled an injury more commonly caused by a heavy weight like a car or machinery compressing the head against the ground. The wound was "gaping" and exposed Gordon's "pulpified, bruised and lacerated brain." Further examination of Gordon's brain revealed "multiple areas of bruising, hemorrhage" and "multiple areas" of "tearing or laceration . . . beneath the skull fractures and moderately severe swelling of the brain in response to injury." (TR3142-50, 3154-60, 3176, 3190.)

Gordon's left elbow was dislocated and his humerus was fractured. He had two shallow cuts in his neck, superficial puncture wounds on his back likely caused by the wire cutters, and a puncture wound with bruising likely caused by the tire iron. Gordon had marks and bruising on his scrotum, penis shaft, and glans consistent with the battery cable clamps being attached to them. The tire iron had been twice forced into Gordon's rectum far enough to transect his liver. (TR3143, 3160-63, 3172-84, 3194.)

The State charged both Wood and Archuleta with capital murder. They were tried separately. *State v. Archuleta*, 850 P.2d 1232 (Utah*), cert. denied*, 510 U.S. 979 (1993); *State v. Wood*, 868 P.2d 70 (Utah 1994). Each testified at his trial. Each blamed the other for nearly all of the injuries inflicted on Gordon. (TR3221-3400, 3684-90; PCR1260.)

The criminal proceedings

The State had no eyewitnesses. It had to present its case through witnesses who traced Archuleta's and Wood's movements, described Archuleta's and Wood's relationship generally and their interactions and demeanor immediately before and after the murder, detailed the forensic evidence, and reported Archuleta's post-arrest statements. Archuleta testified to his version of the events.

FACT STATEMENT

- In longer, multi-issue briefs, use the fact statement only for the facts that tell the general story.
- Reserve facts more directly relevant to specific arguments for those argument sections.
- Alert the court that you are doing this: “For clarity, the State recites additional facts in the relevant argument sections.”

FACT STATEMENT

- Avoid facts extraneous to the issues, BUT
- Don’t leave out all the color either.
- For cases where the historical facts are irrelevant, but would make the court want to rule in your favor, think of ways to get in at least some of them.
- And make sure the historical facts really are irrelevant.

Jeanette Martinez was murdered in her home on December 18, 1996. She died from multiple stabbing and bludgeoning injuries to the head, neck, and torso (R. 400-66). After police took defendant (Jeanette's husband's brother-in-law) into custody, he confessed to the murder (R. 294, 335-41).

FACT AND CASE STATEMENT

- Use your fact statements to tell the story in a way that will make the court want to rule or hold for you, BUT
- Be fair with the facts, AND
- NEVER use a fact or case statement to argue.

ARGUMENT

- Point headings:

➢When possible, incorporate the crux of your argument, the legal standard, and any preservation issue; BUT

➢Keep them simple.

➢If the issue is too complicated, reserve the greater detail for an argument introduction.

THE JURY SAW A VIDEOTAPE OF THE MURDER THAT KELL COMMITTED AND KNEW THAT HE COMMITTED IT WHILE HE WAS SERVING THE MOST SEVERE SENTENCE SHORT OF DEATH; KELL HAS NOT AND CANNOT DEMONSTRATE THAT ANY ERROR BY COUNSEL PREJUDICED HIM

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON HONIE'S CHALLENGE TO TRIAL COUNSEL'S REPRESENTATION ON A POSSIBLE VOLUNTARY INTOXICATION DEFENSE

ARGUMENT

- Let the court know at the beginning what the argument is about:

➢Summarize the opposing party's argument, when appropriate;

➢Identify the issue when you are the appellant;

➢Identify the actual issue when the opposing party has missed the point;

➢End with the relief or outcome you want.

ARGUMENT

There is nothing more agonizing that reading pages of argument-specific facts and an exposition of the law without knowing why you need to know those facts and that law.

Voluntary intoxication is a defense only if it negates a defendant's mental state. Utah Code Ann. § 76-2-306 (West 2004). That is the same standard that applies to a diminished mental capacity defense. Utah Code Ann. § 76-2-305 (West 2004). Therefore, Honie's voluntary intoxication would have excused Claudia's murder only if Honie was so intoxicated that did not know he was intentionally or knowingly killing a person. *Cf. State v. Herrera*, 895 P.2d 359, 362 (Utah 1995) (mental illness is a defense only if it negates the mental state; that is, the defendant's mental illness prevented him from understanding that he knew he was killing a human being); Utah Code Ann. §§ 76-2-103(1) and (2), 76-5-202(1) (West Supp. 2012). That is, it would have been a defense only if Honie did not know he was inflicting knife wounds on a person or at least know that slashing the person's throat four times and stabbing her in the vagina three times was reasonably certain to kill her. *Id*.

Trial counsel did not raise a voluntary intoxication defense. Honie claimed that he was ineffective for omitting that defense. The district court correctly granted summary judgment on this claim.

ARGUMENT

- Do your “predicate” (non-merits) arguments first:

➢Preservation.

➢Inadequate briefing.

➢Exhaustion of remedies.

➢Justiciability.

➢Jurisdiction.

ARGUMENT

- Preservation arguments by appellee (state appellate courts):

➢ State appellate courts are generally less strict about enforcing preservation rules.

➢ In most cases, hit it and get out.

➢ If you intend to push it, focus on why it is unfair to excuse inadequate preservation on a particular claim.

➢ And remember that, if you are appellee, you may rely on unpreserved arguments as a basis to affirm as long as the basis for them is apparent in the record.

ARGUMENT

- Preservation arguments by appellant (state appellate courts):

➢If you rely on an unpreserved argument as a basis to reverse, acknowledge that it is unpreserved and argue plain error.

➢If preservation is unclear, argue why it is preserved, but argue plain error in the alternative.

ARGUMENT

- Preservation arguments by appellee (Tenth Circuit):

➢The Tenth Circuit enforces its preservation rules.

➢But if it's unclear, argue the merits in the alternative or as part of the plain error argument. I like to say, "Appellant has shown no error, plain or otherwise."

ARGUMENT

- Use subheadings to organize and break down your argument into readable portions and to guide the reader
- Honie ineffective assistance claim on the omission of a voluntary intoxication defense.

➢A. Additional facts.

- This is where you put the argument-specific facts.

ARGUMENT

➢B. The district court properly granted summary judgment on this claim.

- Followed by a statement of the governing legal principles; that is, the elements of an ineffective assistance of counsel claim and standard for granting summary judgment.

In order to succeed on his ineffective assistance claim, Honie had to prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 669-70 (1984). To prove deficient performance, he had to prove that specific acts or omissions by trial counsel fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 690; *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah). He had to meet that burden based on the standards of practice in Utah at the time of his 1999 trial and on the facts and law available to counsel. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) (looking to the standard of practice in Los Angeles); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (assessing counsel's performance against the Maryland practice standards at the time of his trial); *Strickland*, 466 U.S. at 689 (courts must evaluate counsel's conduct "from counsel's perspective at the time"); *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993) ("[A] defendant bears the burden of demonstrating why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient."). Honie had to overcome a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. *See also State v. Taylor*, 947 P.2d 681, 685 (Utah 1997), cert. denied, 525 U.S. 833 (1998); Parsons, 871 P.2d at 522, 524. Also, the reasonableness of counsel's investigation "depend[ed] critically" on the information that the provided. Strickland, 466 U.S. at 691. These standards generally carry an inherent burden to establish what Honie told his counsel, what his counsel did, and the reasons for counsel's choices. *See Fairchild v. Workman*, 579 F.3d 1134, 1147 (10th Cir. 2009) ("[B]efore we can determine whether counsel's investigation was deficient, we must first know what he investigated. . . . Only in the most exceptional circumstances will we issue the writ without allowing counsel an opportunity to explain his conduct.").

To prove prejudice, Honie had to prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Honie had to prove that "[t]he likelihood of a different result [was] substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011).

The district court granted summary judgment on Honie's challenge to trial counsel's consideration of a voluntary intoxication defense. Summary judgment has a "salutary purpose in our procedure because it eliminates the time, trouble and expense of a trial when, upon the best showing the plaintiff can make, he would not be entitled to a judgment." *Brandt v. Springville Banking Co*., 353 P.2d 460, 462 (Utah 1960). The State's obligation in summary judgment was to show that Honie's proffer, even if believed, failed as a matter of law to meet his burden. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39 ¶¶26-27, 284 P.3d 630 (agreeing with a determination that the plaintiff's allegations were insufficient as a matter of law to meet its burden on an element of its claim).

But the ultimate burden on the summary judgment motion remained with Honie. *See Orvis v. Johnson*, 2008 UT 2 ¶10, 177 P.3d 600 ("Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law."); Utah Code Ann. §§ 78B-9-104 to -105 (West 2009) (placing the burden in post-conviction on the petitioner). Therefore, Honie ultimately had the burden to demonstrate that there was a genuine, material fact issue that required a hearing. Utah R. Civ. P. 56; *Waddoups v. Amalgamated Sugar Co*., 2002 UT 69, ¶31, 54 P.3d 1054. *See also Jones*, 2012 UT 39 ¶30 ("The determination of which party must come forward with evidence proving that there is a genuine material dispute of fact depends on which party bears the burden of proof on the underlying legal theory or claim that is the subject of the summary judgment motion."). To do that, he had to make his "best showing" and demonstrate how his proffered evidence, if proven and believed, would meet his burden to prove that counsel was ineffective. *See Brandt*, 353 P.2d at 462. Failing that, the district court was required to grant summary judgment. Utah R. Civ. P. 56(c), (e). *See also Jones*, 2012 UT 39 ¶¶30-34 (trial court properly granted summary judgment against nonmoving plaintiff because, despite three years of discovery, it never produced evidence to support a critical element of its claim.)
The district court correctly concluded that Honie failed to show that there was a genuine issue of material fact on this claim.

ARGUMENT

- 1. The Court should disregard the evidence Honie presents for the first time in the merits appeal.
- 2. The district court correctly concluded that Honie's proffer failed to raise a genuine issue of material fact on *Strickland* prejudice.
- 3. The Court may affirm on the alternative basis that Honie's proffer failed as a matter of law to overcome the strong presumption that trial counsel reasonably concluded not to pursue a voluntary intoxication defense.

ARGUMENT

- Once you have stated a legal standard that applies to multiple points, don't cut and paste it into subsequent points. Use a truncated version or refer back:

As stated, Honie bore the burden of overcoming a "strong presumption" that trial counsel's decisions fell with the wide range of constitutionally acceptable performance. In the context of a suppression motion, his burden on the prejudice element also required him to prove both that (1) trial counsel overlooked a meritorious basis to suppress the statements, and (2) without the suppressed statements there would be a reasonable likelihood of a more favorable result. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 389 (1986).

The district court correctly granted the State's summary judgment motion. Honie failed to show that there was a genuine material fact issue on any of his three essential burdens. The failure on one was sufficient to justify summary judgment.

ARGUMENT

- Don’t start by saying why your opponent’s argument is wrong. Instead, first show why you win.
- After you have done that, then address your opponent’s argument, starting with an introductory phrase like “the appellant has not shown otherwise.”
- And if the district court ruled for you, you should usually start there.

The district court ruled that Honie failed to raise a genuine issue of material fact on the *Strickland* prejudice element. This was so because Honie proffered no evidence that his "intoxication at the time of the offense prevented him from understanding that his actions were causing the death of another." The court continued that Honie's words and actions showed the opposite. When Honie exclaimed, "'I stabbed her. I killed her with a knife,'" he "clearly show[ed] that [he] understood he had engaged in lethal conduct upon a human being." And the types and severity of the injuries Honie inflicted on Claudia were "simply inconsistent with a reckless or negligent state of mind." (PCR1024-26.)

That ruling was correct. Honie proffered no evidence to show that he did not know he was killing a human being when he slashed Claudia's throat four times and stabbed her repeatedly in the vagina, anus, and perineum. Most tellingly, he did not proffer his own testimony to that effect. Instead, he only proffered testimony about what alcohol and drugs he consumed. Even that testimony showed that, despite his considerable alcohol and drug consumption, he could, with a single exception, independently remember six years after the murder what he had consumed the day of the murder.

And as the district court recognized, Honie's statements and actions contradicted any conclusion that he did know he was killing a person. In addition to the statements and actions the district court cited, Honie threatened to kill Claudia before he came to the house and carried out his threat. He later admitted to Dr. Cohn that he wished he had been in a blackout so that he would not remember what he had done, implying he knew he was killing someone. And despite his heavy alcohol and drug consumption, he knew what he was doing immediately before and after the murder: he directed Sweeny to the place he wanted to be dropped off, and he responded to and obeyed the police officers' commands.

Honie has not shown that the district court erred. In fact, he does not really address the district court's ruling at all. He argues only that he was prejudiced because trial counsel did not pursue a "viable" voluntary intoxication defense. Honie's Br. 47. In support, he refers only to evidence of what he had consumed. *Id*. at 47-49.

But to establish a fact issue on the *Strickland* prejudice element, he had to proffer evidence that, if proven and believed, would have shown that his intoxication prevented him from understanding that he was killing a person. How much Honie had consumed does not get him there. And he proffered no evidence, even his own testimony, on the controlling question.

ARGUMENT

- Marshal the facts supporting your argument:

The record evidence of Honie's statements and actions would not have led an objectively reasonable attorney to conclude that Honie had a "viable" voluntary intoxication defense. Again, Honie, told police, "I stabbed *her*. I killed *her* with a knife," establishing his knowledge that he had used lethal force on a human being. Before going to Claudia's home and murdering her, he threatened to go to Claudia's home to murder her. Honie's statement to the defense team expert that he wished he could not remember what he had done implied he knew he was killing someone. And despite his considerable consumption, he knew what he was doing immediately before and after the murder.

- When you are challenging a fact finding or a fact-intensive ruling, you are obligated to marshal all of the facts that support the challenged ruling and show why they do not.

The reasonableness of counsel's investigation "depends critically" on the information that the defendant provides. *Strickland*, 466 U.S. at 691. Presumably, Archuleta reported to trial counsel what he testified to at trial: that he was a minor participant in an atrocious murder that Wood committed. Consistent with that theory, Esplin sought to avoid presenting the sentencing jury with evidence of Archuleta's past aggression. He concluded not to call witnesses who would have testified about Archuleta's history of torturing insects and small animals. He successfully fought to exclude evidence of the assault Archuleta committed at the Millard County Jail and chose to avoid getting into Archuleta's institutional record after learning that it included evidence of Archuleta's violent tendencies. He put on psychological evidence to explain the only conduct Archuleta admitted: being present during and failing to intervene in a horrific murder that someone else committed. The psychological evidence demonstrated and counsel argued that Archuleta's deficits resulted from factors beyond his control. Counsel put on evidence of Archuleta's good qualities and his unfortunate first three years of life.

Putting on evidence that Archuleta's "PTSD and pent-up rage stemming from his childhood rapes may well have contributed to the extremely violent killing and sexual assault on" Gordon, or drawing a "nexus between Archuleta's crimes and his developmental and neurological defects" (PCR3005 and 3007) would have devastated the 1989 sentencing theory built around Archuleta's testimony and, presumably, his account to his attorneys of what he did. It would have amounted to an admission that, among other things, Archuleta, not Wood, attached the battery cables to Gordon's genitals in an attempt to kill him by electrocution; that Archuleta, not Wood, beat Gordon's head in; and that Archuleta, not Wood, twice pushed the tire iron into Gordon's rectum far enough to transect his liver.

If trial counsel had put on this evidence, they would have told the 1989 sentencing jury that their client lied when he denied committing those acts. And, they would have made a "highly aggravating" circumstance – torture – undisputed. S. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think? ("Garvey"), 1998 Columbia L. Rev. 1538, 1555 (capital jurors found evidence of torture and brutality during the murder "highly aggravating").

Drs. Gummow and Cunningham also would have added a "highly aggravating" circumstance that Esplin successfully kept the 1989 jury from hearing: future dangerousness. See id. at 1559. Dr. Cunningham would have told the jury that past violence is the best predictor of future violence. The record evidence that Archuleta claims his counsel should have mined and presented would have detailed for the jury Archuleta's lengthy history of violence and aggression, including his assaults on other children, intimidating other children, crushing insects with a rock, and beating a kitten to death using a board with a nail in it. More directly relevant, they would have heard that Archuleta stalked his alleged rapist, sat outside the man's home drinking alcohol, and fantasized about killing him. They would have learned that Archuleta had "beat the shit out" of a man who made homosexual advances toward him. They would have learned that Archuleta commented that he never got his revenge for his undisclosed rapes.

In addition, Drs. Gummow and Cunningham would have told the sentencing jury that Archuleta's aggression grew out of his social history and neurocognitive deficits that limited his ability to control his behavior. . . .

ARGUMENT

- Point it out when your opponent has not marshaled the facts:

Gardner asserts that "[t]he gun was a small caliber gun not an assault weapon; had the bullet hit Mr. Burdell an inch to one side, it is likely that Mr. Burdell would not have died." Appellant's Brief at 77. That argument has no evidentiary support. In seventeen years of litigation, Gardner has developed no evidence to support his speculation that a .22 caliber handgun fired into Burdell's face from a distance of only one to two feet was not reasonably certain to have caused Burdell's death if it had hit only an inch away from Burdell's eye. Also, Gardner testified at trial. He did not testify that he believed a .22 caliber gun fired into a person's face at close was not reasonably certain to cause death.

ARGUMENT

- Don’t forget the fundamentals:

➢Does the argued rule of law actually apply to the circumstances at issue?

➢Is the issue governed by statute? If so, do you have the one that controls?

➢Does the cited case apply or is your issue actually controlled by a more specific case?

➢Is the legal question actually an open one, or is there a controlling case?

ARGUMENT

- Don’t forget the fundamentals, justiciability and similar arguments:

➢Does the other party have standing? That is, is he the right person to press this issue?

➢Is this really the case where the court should address the issue the other side wants the court to address?

➢Is the issue moot? That is, will a favorable outcome still matter?

1. Should the Court grant review to address a circuit split on a rule of law where the Tenth Circuit already has adopted the rule Gardner presumably wants the Court to adopt?

2. Should the Court grant review to vindicate an alleged constitutional right to a full and fair collateral review hearing when Gardner has not shown that any such right exists or that it was violated in his case?

3. Has Gardner shown that a favorable ruling from this Court is likely to result in a favorable outcome?

STATE v. HOUSTON

- Background: To impose death, a jury must find unanimously and beyond a reasonable doubt both that (1) total aggravation outweighs total mitigation, and (2) death is justified and appropriate in the circumstances. The jury could impose life-without-the-possibility-of-parole if if at least 10 jurors found that LWOP was “appropriate.”

STATE v. HOUSTON

- Houston argued that the LWOP statute was unconstitutional because:

➢ Due process requires channeling a “capital” sentencing jury’s discretion.

➢His jury had no guidance other than vague term “appropriate.”

➢Statute did not require the identification and weighing of aggravating and mitigating circumstances.

STATE v. HOUSTON

- What actually happened:

➢ Sentencing jury heard evidence of aggravating and mitigating circumstances.

➢ Jury instructions explained what aggravating and mitigating circumstances were.

➢ Instructions also explained that, in determining the appropriate penalty, the jury

- (1) "must decide how compelling or persuasive the aggravating evidence is when considered against the mitigating evidence," and
- (2) should consider the aggravators and mitigators in terms of persuasiveness, not mere numbers.

STATE v. HOUSTON

Our response to his constitutional argument:

Given the jury instructions, Defendant has no standing to complain about an alleged failure of the life without parole statute to require the identification and comparison of aggravating and mitigating factors. "'[B]efore a party may attack the constitutionality of a statute he must be adversely affected by that very statute.'" State v. Munson, 972 P.2d 418, 421 (Utah 1998) (quoting Sims v. Smith, 571 P.2d 586, 587 (Utah 1977)). Defendant suffered no adverse effect from the deficiencies he alleges in the statute. The sentencing court allowed both parties to present aggravating and mitigating evidence. The jury instructions directed the jury to weigh that evidence in making its determination as to the appropriate sentence. R300,310-11. Therefore, even if Defendant has correctly identified a deficiency in the statute, he lacks standing to raise the issue. See Munson, 972 P.2d at 421.

E. Applying the existing statute, the district court gave Honie funding for the work it believed was "reasonably likely to develop evidence or legal argument to support" his claims; due process and reliability demand no more.

Honie asks the Court to create a state constitutional right to the effective assistance of post-conviction counsel. He acknowledges that the PCRA creates a right to funded, qualified post-conviction counsel. But he complains that it specifically precludes relief if post-conviction counsel is ineffective. This, he says, "is an empty promise at best, and a cheat at worst." Honie's Br. 100.

Honie has not shown that he was cheated. *Cf. State v. Pearson*, 943 P.2d 1347, 1350 (Utah 1997) (Pearson lacked standing to challenge the constitutionality of a statute because he was not convicted under it and therefore could show no harm from any constitutional defect in it). When faced with Honie's requests for post-conviction litigation funds, the district court recognized that it had "to consider whether [Honie] has shown that the work done to date and the future work identified *is reasonably likely to develop evidence or legal arguments in support of*" his penalty phase ineffective assistance claims (PCR2835 (emphasis added)). The court reasoned that he had not and could not make that showing because the undisputed facts showed that McCaughey met his Sixth Amendment obligations to Honie (PCR2835-37). And as shown in point V, that ruling was correct.

Honie argues that the Court should nevertheless create a constitutional right to the effective assistance of post-conviction counsel. He argues that the ABA Guidelines must define the scope of post-conviction counsel's duties under the new right. That includes, according to him, a re-investigation of the entire case. Honie's Br. 104.

But the negative pregnant in the district court's ruling was that, if Honie had shown that the additional funds were reasonably likely to develop evidence and arguments in support of his post-conviction claims, then the court would have given him the funds under the existing statute. In context then, Honie argues that the Court should create a state due process right to a complete re-investigation of the case regardless of whether it is reasonably likely to develop evidence and legal arguments to support post-conviction relief. That is not due process; it is wasted process. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) ("In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death.").

Kell claims that the death penalty violates the Eighth Amendment's prohibition on cruel and unusual punishment. This is so, he says, because emerging "empirical evidence" "has eroded" the retribution and deterrence justifications for the death penalty. Doc. no. 94 at 137-38.

Kell acknowledges that, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court held that the death penalty does not categorically violate the Eight Amendment. Kell asks this Court to overturn that precedent because, he says, empirical data has "eroded" both the retribution and deterrence arguments in support of the death penalty. He relies on a single law review article for support. Doc. no. 94 at 137-38 (citing Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 Stan. L. Rev. 751 (2005)). But he has not explained why the view of a single commentator he selected justifies overriding Utah's decision to apply capital punishment and overturn existing Supreme Court precedent.

To challenge the retributive justification for capital punishment, the commentator Kell cites points to data she believes shows its racially discriminatory application. That is, she argues the data shows black defendants get the death-penalty more than white defendants, and defendants get the death penalty more frequently for killing white victims than black victims. This perceived inequity, she says, undercuts the retributive benefit of the death penalty. Steiker at 769-71.

This rationale does not apply to Kell. The jury sentenced white-supremacist Kell to death for killing African-American inmate Blackmon in a murder that was motivated partly by Blackmon's race. Whether the death sentence generally is applied disproportionately against African-Americans or where the victims are Caucasian does not call into question the retributive reason to sentence Caucasian Kell to death for killing African-American Blackmon.

As to deterrence, Steiker's article responds to another article where the authors argue that the death penalty has an empirically demonstrable deterrent effect. See Cass R. Sunstein, Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005). So at most, Kell has shown a conflict in the empirical data and disagreement among commentators about what the data means. He does not explain how these conflicts and disagreements on deterrence justify this Court overturning the Supreme Court to invalidate a penalty Utah believes is appropriate.

And again, this reasoning has nothing to do with Kell. Regardless of whether his execution will deter others from killing, it will "deter" him from killing anyone else. This is particularly important here. Nevada imposed on Kell the next highest possible punishment for the first murder he committed. Far from deterring him, he viewed it as a license for further violence. Therefore, no punishment other than death remained to "deter" Kell.

ARGUMENT

- Look for the stake-to-the-heart argument. Start with that and keep bringing the court back to that.

➢This is part of identifying what is really at issue.

All of Kell's post-conviction claims resolved to ineffective-assistance claims, at best. Therefore, Kell had to prove that, but for counsel's errors, if any, there would have been a reasonable probability that the jury would have acquitted him of capital murder or would have sentenced him to something less than death. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

Kell never could have met that burden. There was no substantial question about Kell's guilt. The jury saw a videotape of Kell stabbing Blackmon sixty-seven times. They saw him twice walk away from Blackmon, then return to inflict more wounds.

Similarly, there was no substantial question about the penalty Kell should receive. In addition to seeing the brutal attack, which included stab wounds to Blackmon's eyes, the jury heard Kell's history of extensive violence and threats of violence while incarcerated. It knew that revenge and racial hatred motivated the murder. It knew that Kell murdered a fellow inmate while housed in a maximum security unit. The jury knew that Kell murdered Blackmon while serving the next lowest sentence allowed by law: life without the possibility of parole. The jury also knew that Kell's LWOP sentence actually encouraged Kell's violence because Kell perceived that he had nothing to lose. The irrefutable evidence established beyond all doubt Kell's future dangerousness, which is a highly aggravating sentencing factor. . . . The jury that had to decide whether to give Kell a sentence less than death knew that all means to deter Kell's violence short of a death sentence had been exhausted to no avail. Nothing Kell's counsel could have done would have saved Kell's life.

Because Kell never could have proven *Strickland* prejudice, his post-conviction claims all failed as a matter of law.

Voluntary intoxication: it’s not how drunk you are; it’s whether your intoxication prevented you from knowing you were using lethal force on a person.

Houston raped and murdered a young counselor at the center where he was housed for sex-offender treatment. He argued that his life-without-possibility-of-parole sentence was cruel and unusual because he was a juvenile (17 ½) when he committed the murder.

In partial response, the State argued, “This was not a single, inexplicable violent episode. Rather, it marked the culmination of a history of relentless sexual violence.”

ARGUMENT

- Use conclusions:

➢At the end of each point, especially if they are lengthy;

➢At the end of the memorandum or brief.

- To remind the court what was at issue and the relief you want.
- Caveat: If there are too many points, don't try a lengthy recap. Just remind the court what you want it to do based on the arguments you've made.

In sum, a reasonable attorney could have chosen not to present the 1989 jury with a mitigation case that Gordon's murder had its roots in Archuleta's festering hatred of homosexuals and in his irreparable social and psychological damage that made him an ongoing risk of violence, both in the community and in penal institutions.

The Court should deny Carter's rule 60(b) motion for two independent reasons. First, it is untimely. Second, it is actually a third post-conviction petition improperly filed under the guise of a rule 60(b) motion challenging the judgment denying the second petition. If the Court concludes otherwise, the State requests that it set a scheduling conference to establish a deadline for the State to respond on the merits.

This case is about an adult man who had sex with a fifteen year old girl multiple times. The State charged him with four counts of third-degree felony unlawful sexual activity with a minor. He admitted to two counts. He has never identified any evidence that would have made conviction on the other two unlikely. His attorney secured a plea deal that required him to plead to only one count.

Soto-Chavez has proven neither element of his ineffective assistance claim: (1) that counsel gave him wrong immigration advice; or (2) that it would have been rational for him to go to trial rather than accept the plea. His failure to prove even one element defeats his claim.

As to the prejudice element, the evidence plainly shows that Soto-Chavez did not want to be deported. But his choice to have sex with a fifteen year old girl jeopardized his continued presence in this country. And his guilt for those crimes – whether admitted through a plea or imposed by a jury even on just the two counts he admitted to police – made his deportability inevitable.

But it is just as plain from the evidence that Soto-Chavez wanted to minimize his incarceration term. Going to trial would have defeated that goal. Even if the jury convicted him only of the two counts he admitted to police, it would have exposed him to a maximum of ten years in prison rather than the five year limit guaranteed by his plea. And if, as his trial counsel predicted, a jury would have convicted him on all four counts – a prediction Soto-Chavez has not challenged – that maximum would have increased to twenty years. Soto-Chavez never testified he was willing to risk a maximum prison term four times that of the maximum under his guilty plea. The evidence shows he was not because it would have interfered with his ability to provide support to his family regardless of whether he would be able to do that here or from Mexico.

Soto-Chavez also has not shown that Allred misadvised him. Allred testified that he warned Soto-Chavez that his plea would cause immigration "problems" and told him to consult an immigration lawyer. Soto-Chavez testified that he relied on "Joe's" advice that his green card would be saved. But "Joe" was not a lawyer, and Allred's advice, which came later, superseded any misadvice "Joe" gave Soto-Chavez.

ARGUMENT

- Start with why you win, not why your opponent is wrong.
- Put your most compelling merits arguments first.
- After you have done the remainder – and especially if there are a lot of them – do a summary paragraph at the end to remind the court what is the most critical.

ARGUMENT

- NEVER disregard contrary controlling authority.

➢ You have an ethical obligation to disclose it.

➢ If you don't you may get something like this from your opponent:

Soto-Chavez's counsel had an ethical obligation to bring the controlling precedent to the Court's attention. *Lieber v. ITT Hartford Ins. Center, Inc.*, 2000 UT 90 ¶13, 15 P.3d 1030 (citing Utah R. Prof. Conduct 3.3). He did not. Instead, he cites *Padilla* throughout his supplemental memorandum without once acknowledging that the *Padilla* obligations do not apply here. And he cannot claim that he overlooked *Chaidez* and the *Collins* cases which rely on *Chaidez*: he was counsel in the *Collins* cases.

➢ And if you overlook it, say so and grovel.

ARGUMENT

- Likewise, NEVER disregard the elephant in the room.

➢ You might get something like this from your opponent:

Honie states that he has limited his recitation of the crime facts because, according to him, "these appeals are specific to the legal issues raised during Honie's post-conviction proceedings." Honie's Br. 8. If he means that the crime circumstances have limited or no relevance to the "legal issues," he is wrong. All of the claims at issue are ineffective assistance of counsel claims. The entire criminal record – especially the details of the murder Honie committed – is indispensable to assessing those claims. *Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.") (emphasis added). The crime circumstances help illuminate what trial counsel did and why. They are essential to assessing whether, in light of all the evidence (old and new) there would be a reasonable probability of a more favorable outcome. The State presents the relevant details Honie chose to omit.

ARGUMENT

- State your argument directly and affirmatively. NEVER use:

➢"The State's position is…"

➢"The State would argue…"

- Don't tell, show.

➢Avoid hyperbolic and pejorative characterizations of the opposing arguments or adverse rulings below.

➢Instead, weave the facts and law together to show how they are just dead wrong.

ARGUMENT

- Eliminate citations to unnecessary authority (string cites).

➢ It's not a law review article.

➢ You are not presenting the court with a general exposition of the law; you are presenting the court with a clear path to rule or hold for you.

➢ Pick the controlling case that is closest to your facts.

➢ If it's light on analysis, cite the case where the principle was most thoroughly analyzed, then use the case closer to your facts to show that the principle has been re-affirmed on facts materially the same as those in your case.

ARGUMENT (string cites cont'd)

- If your goal is to establish that the principle is well settled, pick a small sampling covering the relevant period, no more than four.

ARGUMENT

- Don’t include citation to unnecessary non-controlling authority.
- Exceptions:

➢Use extra-jurisdictional authority when you are asking the court to adopt a new rule.

➢Use extra-jurisdictional authority to ask for a refinement of an already existing rule.

ARGUMENT

- Block quotes:

➢When debating whether to use one remember this:

NOBODY READS THEM.

➢Try breaking it down to its most crucial points and quote those in regular text.

➢If you must use them, do a summary at the beginning to tell the court what the block quote says. Most likely that is all the court will read anyway.

Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel " 'must fully comply.' " 560 F.3d, at 526 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 693 (C.A.6 2006)). *Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such.

Imposing "detailed rules for counsel's conduct…would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 688-89. So while "[p]revailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable," "they are only guides," *id*. at 688, not "inexorable commands with which all capital defense counsel 'must fully comply,'" *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009) (citation omitted).

CONCISE & CONCRETE

- Use the simplest, most direct language.
- Avoid legal writing conventions that don’t advance your argument.
- Write with pictures, not abstractions.

CONCISE & CONCRETE

Comes now the respondent, State of Utah, by and through counsel of record, Assistant Attorney General Thomas B. Brunker, and respectfully submits the following Memorandum in Support of his Motion for Summary Judgment.

- Comes now:
- ➢ Obviously you're coming to the Court.
- ➢ & obviously you're doing it now.
- Respondent, State of Utah:
- ➢ The State's status is in the caption. Why repeat it here.
- By and through:
- ➢ Pick one.
- Of record:
- ➢ If your name is on the pleading you are by rule "counsel of record."
- Your name and title are gen'lly irrelevant to the argument.
- Respectfully:
- ➢ Don't pander. It's disgusting.
- Try this: The State, through counsel, submits the following memorandum in support of its summary judgment motion.

CONCISE & CONCRETE

- Generally, use active, not passive voice and be concrete.

➢Claudia Benn's home was broken into by defendant. Her throat was cut. Police heard Honie admit that he killed Claudia.

➢Honie broke into Claudia Benn's home. He slashed her throat four times, stabbed her in the vagina three times, and stabbed her in and around her anus. After police surrounded the home and Honie exited, he said, "I stabbed her. I killed her with a knife."

CONCISE & CONCRETE (active voice)

- BUT:

➢ Maurine's thumb print was in the car Menzies was driving the night Maurine disappeared. Her identification was found in a jail room Menzies ran to during an arrest. More of Maurine's identification was found in Menzies' girlfriend's belongings. Maurine's purse was at Menzies' apartment. Green shag carpet fibers found on Maurine's clothing were similar to fibers from the carpet in Menzies' apartment.

- Using the passive voice here achieves two related things:

➢ It eliminates from the discussion actors who are unnecessary to my point; and

➢ It emphasizes the repeated intersections between Menzies and the murder victim.

Avoid	Use
At the present time	*Now*
At the same time as	*As, while*
At the time when	*When*
At this point in time	*Now*
Because of the fact that	*Because*
Despite the fact that	*Although, even though*
During such time as	*During, as*
For the purpose of	*To, for*
In order to	*To*
In spite of the fact that	*Although*
In the event that	*If*
In the instant case	*Here, in this case*
In the near future	*Soon*
In view of the fact that	*Because*

Notwithstanding the fact that	*Although, even though*
On a weekly basis	*Weekly*
On the grounds that	*Because*
Owing to the fact that	*Because*
Period of time	*Period, time*
Prior to	*Before*
Subsequent to	*After, since*
To the extent that	*If*
Under circumstance in which	*When, if*
Until such time as	*Until*
Whether or not	*Whether*
With regard to	*About, on, as for*
With respect to	*About, on, as for*

Avoid	Use
Did not accept	*Rejected*
Did not allow	*Prevented*
Did not consider	*Ignored*
Does not have	*Lacks*
Not the same as	*Different from*

Has a tendency to	Tends to
Is of the opinion that	*Believes*
Make changes in	*Change*
Make decisions on	*Decide*
Provide a summary of	*Summarize*
Serve to make reductions in	*Reduce*
It is plaintiff who denied	*Plaintiff denied*
It should be noted that defendant admitted	*Defendant admitted*
There are some members of the class who claim	*Some class members claim*
There is nothing about section 76-3-202 that	*Nothing in section 76-3-202*

Avoid	Use
In the case of Marbury	***In Marbury***
The purpose of the hearsay rule is to	***The hearsay rule***
Both of these findings	***Both findings***
The findings that are set forth in the	***The findings in the***
Many of the cases that the Plaintiff cites	***Many cases cited in***

AVOID "PURPLE PROSE" & SILLINESS

- "The [trial] Court's going forward in the face of Appellant's act was abusive and sinister."
- "Furthermore, the allegations that Appellant described his ex-girlfriend as a 'whore, cunt, and bitch' is not itself threatening, just profane. She may have fit any or all of his pejorative descriptions."
- "Jury selection was an abomination."
- "Mr. Taylor was the Cipher in the Snow, passed over and abandoned by his family and his community."
- "Indeed, LDA couldn't connect the dots about Brown ruining a pair of high heels in the mud, or not wearing her glasses on this alleged nature walk – presumably because Brown wanted to appear sexy."
- "Brown could not make any identification due to bad eyesight and not wearing her glasses (implicitly to appear sexy)."

INTRODUCTORY STATEMENT

Defendant confessed to murder during a mid-day, post-*Miranda* interview that lasted less than an hour. He was not handcuffed, suffers from no mental defect, and was allowed to speak with his wife before the interview. When he confessed, Defendant did not parrot a story that had been given him by the detectives, but instead provided an account of the murder that contradicted what the detectives had earlier suggested may have happened.

Despite all this, the trial court suppressed Defendant's confession solely because detectives had appealed to Defendant's love for his daughters during the interview. The court's categorical approach runs contrary to settled authority and sound public policy, and it should accordingly be reversed.

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Despite all this, the trial court suppressed Defendant's confession solely because detectives had appealed to Defendant's love for his daughters ~~during the interview~~. ~~The~~ That ~~court's~~ categorical approach ~~runs contrary to~~ contradicts settled authority and sound public policy. This Court should reject ~~, and~~ it ~~should accordingly be~~and reverse~~d~~.

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Despite all this, the trial court suppressed Defendant's confession solely because detectives had appealed to Defendant's love for his daughters. That categorical approach contradicts settled authority and sound public policy. This Court should reject it and reverse.

ORAL ARGUMENT

- Most of the rules that apply to writing apply to oral argument as well.
- Remember that oral argument is not a presentation, it's a conversation,

  but it's also a presentation.

➢Be thoroughly conversant with your case so that you have the flexibility to answer questions, but make your most important points as well.

ORAL ARGUMENT

- Never, ever say, “I’ll get to that in a minute,” when a judge or justice asks questions out of order of your presentation.
- She has just told you what is most important or troubling to her. Embrace the opportunity to address it.

ORAL ARGUMENT

- Introduction:

➢You can almost always get out a few sentences before you get asked questions;

➢Use them wisely.

- State your theme, if you have one.
- Give some context to the case or general reason to rule for you.

ORAL ARGUMENT

- Find your theme.
- Winning argument or fact.
- Point on which the entire case turns.
- Go for the jugular.

ORAL ARGUMENT

- Distill theme into an opening hook

➢One or two sentences that encapsulate your argument

➢Write and rewrite it

➢Memorable or slightly provocative

ORAL ARGUMENT

- This appeal is from Carter's second post-conviction challenge to a murder he committed and twice confessed to 27 years ago. This is his fourth trip to this Court. And he has a review pending in the federal court.

➢This raises the unspoken question, "What more could there possibly be at this late stage?"

ORAL ARGUMENT

- To put the guilt phase issue in context, Honie said he was going to kill Claudia, then he did kill her, then he immediately told police he killed her, & then he admitted he remembered killing her & how he did it.

➢In other words, there is no real issue about guilt.

ORAL ARGUMENT

- "The question before this court is whether a resident of Utah violating a statute of Utah may be prosecuted in Utah."
- "The question in this case is whether the Legislature intended to define abortion to include punching a pregnant woman in the stomach."
- "*Miller v. Alabama* confirms what the USSCT recognized in *Roper v. Simmons*: Juvenile murderers can be sentenced to LWOP."
- The rape and murder that netted Houston an LWOP sentence was not an isolated crime, but the culmination of a clear pattern of escalating sexual violence.

ORAL ARGUMENT

- Mantra, slogan, catch-phrase.
- Memorable phrase or metaphor that reduces the case to its essence.
- Sprinkle throughout argument.
- If the court understands your mantra, it will give your argument clarity and power.
- Goal: one or more judges will repeat your mantra in conference.
- BUT: don't be so wedded to your mantra that you use it no matter what.

➢ Be flexible. Abandon or modify the mantra to accommodate what transpires at argument. Don't use a mantra on something that the court's questioning makes plain isn't really an issue for them anyway. Or more succinctly: don't make an issue of something that isn't an issue.

ORAL ARGUMENT

- Cases :

➢Only the most important.

➢Only provide cites if you are responding to something first raised in a reply.

- Exit line

➢Craft it.

➢Memorize it.

➢3-second version: “We urge this court to affirm.”

➢15-second version: “Because . . ., we urge this court to affirm.”

ORAL ARGUMENT

- Preparation:

➢Prepare an outline that is easy to use while you're on you're feet.

➢Know the case inside and out so you don't need the outline except as the most basic means of remembering where you are in your presentation.

ORAL ARGUMENT

- "Moot" your case:

➢Formal: get some of your colleagues to play judge.

➢Informal: discussion of what's at issue and where the court is likely to go.

➢The "idiot savant," or more appropriately, the "intelligent ignorant." Get at least one person who is not familiar with the case or legal issue.

➢Run your arguments by a spouse, child, neighbor, etc.

ORAL ARGUMENT

- Preparing for questions:

➢Brainstorm questions, craft answers.

➢Consider the case from the judge's POV.

➢Consider the case from your opponent's POV.

➢Consider the case from amicus' POV.

➢Identify the questions you do not want to hear.

➢Consider questions that may ask you for concessions.

➢Consider possible hypotheticals.

ORAL ARGUMENT

- Springboard from what happened just before you stood up.
- Be pointed, or the time I used the “F” bomb in the Utah Supreme Court (don’t worry, I was quoting defendant).

ORAL ARGUMENT

- Answer questions with “yes,” “no,” or “yes, with one qualification.”
- *Then* elaborate.
- End with your theme.
- If the question is extraneous to what is at issue, still answer the question – if you can – but end with a reminder that it is extraneous and why.

ORAL ARGUMENT

- The “tar baby” judge:

➢“Your honor, I’m afraid I’m unable to improve on the answer I have already given to that question . . .”

➢“In the context of this case . . .”

➢“Your honor, I have two responses to that question. First, [repeat unacceptable answer]. Second, [segue back to your main point].”

ORAL ARGUMENT

- Concede unnecessary points or points where the facts and the law is against you, BUT
- Be sure you should concede, AND
- Beware the devastating concession.
- "Typically we would address the prejudice issue under deferential AEDPA standards because the issue was addressed on the merits by the Utah Supreme Court. Oddly, however, in oral argument the state asserted, against its interest, that the issue should be reviewed de novo. . . . The state reached this conclusion by applying . . . our decision in *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir.2008).
- The 10th Circuit then explained to me how I misunderstood *Wilson*.
- And it concluded that applying the statutory standard was mandatory, and I could not waive its application.

ORAL ARGUMENT

- Don’t bluff:

➢If you are not familiar with a case or are unsure about something in the record, say so.

ORAL ARGUMENT

- Do not cover the clock.
- End early if possible.
- Exceed time only to answer a question.
- Request additional time to answer a question.

ORAL ARGUMENT

- End with a bang, not a whimper.
- Don’t launch into a questionable argument with two minutes to go.
- Return to your core theme.
- Recite your memorized exit line
- Option: commandeer rebuttal

➢End with challenge to opponent

Michigan Soliciter General John Bursch at the end of his argument to the U.S. Supreme Court:

So -- so really, the problem here is not any unfairness, the problem is the Sixth Circuit yet again not applying habeas deference under the statute or this Court's precedent and disregarding another Michigan State court decision where reasonable jurists could have reached different conclusions on this.

It's not our burden to -- to demonstrate what the law was or wasn't. All we have to show is that a reasonable jurist could have reached the conclusion the Michigan Court of Appeals did here, and there doesn't appear to be any question that's the case.

JUSTICE SCALIA: You want us to say "yet again" when we write our opinion?

MR. BURSCH: Yes, Justice Scalia.

If there are no further questions, thank you very much.

ORAL ARGUMENT

- Use rebuttal to rebut:

➢Always reserve rebuttal time.

➢Rebut, don’t repeat.

➢One or two points.

➢Correct opponent’s misstatements.

➢“Unless the court has further questions, we’ll waive rebuttal.”

ORAL ARGUMENT

- Post-argument filings:

➢Rule 24(j) for a case you were asked about or did not know.

➢Answer questions left unanswered.

➢Clarify misstatements by either party.

➢Retract concessions.